



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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In Re:

DAVID EUGENE POPLIN,

Debtor.

3:08-CV-0560-LRH-VPC

ORDER

BARRY L. SOLOMON, Trustee

Appellant

v.

WESTERN EXTERMINATOR COMPANY,

Appellee.

Before the court is an appeal from an order from the bankruptcy court dismissing appellant's complaint for failure to effect service pursuant to Fed. R. Civ. P. 4(m). Doc. #1¹. Appellant Barry L. Solomon (the "Trustee") filed his opening brief on January 15, 2009. Doc. #8. Appellee Western Exterminator Company ("Western") filed its answering brief on January 30, 2009. Doc. #9. Thereafter, the Trustee filed a reply brief on February 9, 2009. Doc. #12.

I. Facts and Procedural History

The debtor, David Poplin, filed a voluntary chapter 7 bankruptcy. On September 18, 2003,

¹ Refers to the court's docketing number.

1 the Trustee filed a recovery action against numerous defendants, including Western. Western was
2 served with the complaint on January 20, 2004, after the 120-day period for service. Western filed a
3 motion to dismiss for failure to timely serve. The bankruptcy court granted the motion and held that
4 the Trustee had not shown good cause for the untimely service.

5 Thereafter, the Trustee appealed to the district court. *See* Doc. #1, case no. 3:04-cv-0253-
6 LRH-VPC. On appeal, the district court remanded the matter to the bankruptcy court to elaborate
7 upon an issue which was not made clear by the record. Doc. #11, case no. 3:04-cv-0253-LRH-VPC.
8 Specifically, the bankruptcy court was asked to determine if “it was aware that good cause was not
9 necessary for it to have granted additional time for service,” and whether “it would still deny
10 additional time for service” in light of its broad discretion. *Id.* The district court held that if the
11 bankruptcy court ruled in the affirmative, the dismissal order would be affirmed in its entirety. *Id.*

12 On remand, the bankruptcy court concluded that it was aware that it had broad discretion to
13 grant additional time for service even without a showing of good faith, but declined to exercise its
14 discretion. *See* Doc. #1. The bankruptcy court affirmed its prior order of dismissal and the Trustee
15 filed the present appeal. *Id.*

16 **II. Discussion**

17 The Trustee appeals the bankruptcy court’s dismissal of the complaint against Western for
18 failure to effect service pursuant to Fed. R. Civ. P. 4(m). Doc. #1. Pursuant to Rule 4(m):

19 If a defendant is not served within 120 days after the complaint is filed, the court - on
20 motion or on its own after notice to the plaintiff - must dismiss the action without prejudice
21 against that defendant or order that service be made within a specified time. But if the
plaintiff shows good cause for the failure, the court must extend the time for service for an
appropriate period.

22 The Trustee argues (1) that the bankruptcy court erred in finding that there was not good cause
23 which would have required the court to extend the time for service, and (2) that the bankruptcy
24 court erred in declining to exercise its broad discretion to extend the time for service even in the
25 absence of good cause. Doc. #8.

1 **Good Cause**

2 A district court reviews a bankruptcy court's findings of fact for clear error. *In re Rucker*,
3 570 F.3d 1155, 1160 (9th Cir. 2009). A bankruptcy court's findings are clearly erroneous when the
4 reviewing court "is left with a definite and firm conviction that a mistake has been committed." *In*
5 *re Clark*, 262 B.R. 508, 514 (9th Cir. BAP 2001). The Trustee argues that the bankruptcy court
6 erred in finding that the Trustee had not shown good cause for the late service.

7 The bankruptcy court found that the Trustee had not shown good cause for the late service
8 because: (1) the Trustee knew where and how to serve Western four months prior; (2) he made a
9 conscious decision to wait to serve the defendants until after the debtor had been served; (3) he was
10 not so seriously ill on the 120th day that he couldn't put the complaint and summons in the mail;
11 and (4) the Trustee gave no satisfactory explanation as to why he simply could not have gone ahead
12 and served Western in the preceding 119 days. *See* Doc. #1.

13 After reviewing the record, the court finds that the bankruptcy court did not commit clear
14 error. The Trustee provides no explanation as to why it could not serve Western within 120 days.
15 *See* Doc. #8. Therefore, the bankruptcy court's finding that the Trustee did not have good cause is
16 affirmed.

17 **Exercise of Discretion**

18 Absent a showing of good cause, the bankruptcy court has the discretion to dismiss the
19 complaint or extend the time period for service. *See In re Sheehan*, 253 F.3d 507, 512 (9th Cir.
20 2001) (citing *Petrucelli v. Bohringer & Ratzinger, GmbH*, 46 F.3d 1298, 1305 (3rd Cir. 1995); *see*
21 *also, Henderson v. United States*, 517 U.S. 654, 662 (1996); *In re Waldner*, 183 B.R. 879, 881 n.2
22 (9th Cir. BAP 1995). Here, the bankruptcy court declined to exercise its broad discretion and
23 instead dismissed the complaint against Western. Doc. #1. The Trustee argues that this decision
24 was in error.

25 The dismissal of a complaint for failure to timely serve a complaint is reviewed for abuse of
26

1 discretion. *In re Sheehan*, 253 F.3d at 511. A bankruptcy court abuses its discretion when its
2 decision is a clear error of law. *Redfield v. Insurance Co. of N. America*, 940 F.2d 542, 544 (9th
3 Cir. 1991) (citing *United States v. Washington*, 935 F.2d 1059, 1061 (9th Cir. 1991)).

4 The bankruptcy court declined to extend the time for service because it did not want to
5 reward or "relieve the plaintiff of his own delay." Doc. #1. The Trustee made a conscious decision
6 in managing the litigation to wait and serve the defendants after he served the debtor and he
7 defaulted in order to reduce the time he had to spend at hearings and conferences. It was the
8 Trustee's decision, and his decision alone, to serve Western late and, because of his decision, the
9 bankruptcy court did not extend the time for service. Declining to extend the time for service when
10 it was a plaintiff's choice to serve a defendant late is not an abuse of discretion. *See e.g., Hason v.*
11 *Medical Board of California*, 279 F.3d 1167, 1174 (9th Cir. 2002) (affirming dismissal for delayed
12 service when plaintiff made a conscious decision to serve defendant late). Based upon the record
13 before the court, the bankruptcy court did not abuse its discretion in dismissing the complaint in
14 light of the plaintiff's conscious decision to effect late service.

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16 IT IS THEREFORE ORDERED that the bankruptcy court's rulings are AFFIRMED and the
17 appellant's bankruptcy appeal (Doc. #1) is DENIED.

18 IT IS SO ORDERED.

19 DATED this 21st day of September, 2009.

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21 
22 LARRY R. HICKS
23 UNITED STATES DISTRICT JUDGE
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